

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
**FILED**

NOV 27 2000

CLERK, U.S. DISTRICT COURT

By Deputy *dja*

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF TEXAS**

STEPHEN B. JONES, LINDA D.  
LYDIA and CAROLINE FRANCO,  
as Texas registered voters,

Plaintiffs,

v.

CIVIL ACTION NUMBER  
3:00-CV2543-D

GOVERNOR GEORGE W. BUSH  
AND RICHARD B. CHENEY, as  
candidates for President and Vice-  
President of the United States of  
America; and Ernest Angelo, Gayle West,  
Betty R. Hines, James B. Randall,  
Helen Quiram, Henry W. Teich, Jr.,  
William Earl Juett, Hally B. Clements,  
Howard Pebley, Jr., Adair Margo,  
Tom F. Ward, Jr., Carmen P. Castillo,  
Chuck Jones, Michael Paddie,  
James Davidson Walker,  
Joseph I. O'Neil, III, Betsy Lake,  
Robert J. Peden, Jim Hamlin,  
Mary E. Cowart, Sue Daniel,  
James R. Batsell, Loyce McCarter,  
Michael Dugas, Neal J. Katz,  
Mary Ceverha, Clyde Moody Siebman,  
Randall Tye Thomas, Cruz G. Hernandez,  
John Abney Culberson, Stan Stanart,  
and Ken Clark, Texas Electors,

Defendants.

**DEFENDANTS ERNEST ANGELO, GAYLE WEST, JOSEPH I. O'NEIL, III,  
BETSY LAKE, JIM HAMLIN, MARY E. COWART, MICHAEL DUGAS, AND  
JOHN ABNEY CULBERSON'S RESPONSE TO CERTAIN EXPEDITED  
RELIEF REQUESTED BY PLAINTIFFS**

**TO THE HONORABLE JUDGE OF THIS COURT:**

Defendants Ernest Angelo, Gayle West, Joseph I. O'Neil, III, Betsy Lake, Jim Hamlin, Mary  
E. Cowart, Michael Dugas, and John Abney Culberson, collectively the Elector Defendants, file their

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response to certain expedited relief requested by Plaintiffs in their Emergency Amended Complaint and Application for Injunctive and Declaratory Relief ("Amended Complaint").

In an order dated November 22, 2000, this Court directed defendants to respond to certain expedited relief requested by Plaintiffs in their Amended Complaint. Plaintiffs have requested: (1) expedited discovery, including the deposition of Secretary Richard Cheney on or before December 1, 2000 and (2) an expedited hearing that is consolidated with the final trial on the merits to be held no later than December 12, 2000. In accordance with the Court's order, the Elector Defendants file this response.

As an initial matter, this Court cannot grant any of the expedited relief requested by Plaintiffs because this Court lacks subject matter jurisdiction over this lawsuit and over the Texas Electors. Subject matter jurisdiction is a threshold issue that must be resolved at the beginning of a lawsuit. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case." *Id.* at 94, 118 S.Ct. at 1012 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Concurrent with the filing of this response, the Elector Defendants have also filed a motion to dismiss based on the absence of subject matter jurisdiction. Specifically, the Elector Defendants' motion to dismiss demonstrates that this Court lacks jurisdiction because (a) Plaintiffs have no standing to assert an alleged Twelfth Amendment violation and (b) this suit presents a non-justiciable political question. *See* The Elector Defendants' Motion to Dismiss. The Elector Defendants' motion to dismiss also requests dismissal because the Court lacks jurisdiction over the Texas Electors since they have not yet been served with process in

this action.<sup>1</sup> *See Id.* The Elector Defendants hereby adopt and incorporate by reference the arguments raised in their motion to dismiss as a part of this response. Because this Court lacks subject matter jurisdiction and the Elector Defendants have not been served with process, Plaintiffs' Amended Complaint should be dismissed and the expedited relief requested by Plaintiffs should be denied as moot.

Assuming *arguendo* that this Court in fact has jurisdiction, the Elector Defendants nevertheless object to the expedited discovery requested by Plaintiffs. At this point, most of the 32 Texas Electors are unaware that they have been sued. None of the Texas Electors have been served with process, and most of them have yet to retain counsel. Conducting discovery before all of the Texas Electors have received service of process not only raises due process concerns, but it also presents practical difficulties. Each of the 32 Texas Electors are entitled to be involved in the discovery process. For example, if a deposition were to take place, each of the 32 Texas Electors have a right to attend the deposition. Allowing discovery to go forward before certain necessary parties have notice of the action frustrates this basic right to participate in the discovery process. Expedited discovery would also force these parties to participate in discovery before their answer to the Amended Complaint is even due.

In addition, Plaintiffs have not demonstrated any need for conducting any discovery before filing their injunction papers, much less a need for deposition testimony. To the contrary, the legal issues raised by Plaintiffs can be decided on the briefs and motions. This is consistent with this Court's order of November 20, 2000, which set forth a briefing schedule in this case and indicated

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<sup>1</sup>The undersigned is in the process of contacting all 32 Texas Electors to apprise them of the filing of Plaintiffs' Amended Complaint. As of this moment, the undersigned only represents eight of the 32 electors.

that the preliminary injunction motion would be decided on the papers unless there is a need for an evidentiary hearing "to resolve a controlling fact issue that involves a determination of witness credibility." *See* Order dated November 20, 2000.

The Elector Defendants also object to expedited discovery because Plaintiffs' "emergency" is of their own making. As Plaintiffs' Amended Complaint plainly alleges, Secretary Cheney accepted Governor George W. Bush's offer to be his running mate on July 25, 2000. Secretary Cheney officially became the Republican party's nominee for Vice-President at the Republican convention that began on July 31, 2000. Accordingly, Plaintiffs have been aware for almost four months that Governor Bush and Secretary Cheney would be the Republican nominees for President and Vice-President respectively. Yet, Plaintiffs have waited until now to assert their claims, thereby creating the "emergency" that now allegedly exists. The equitable doctrine of laches should bar Plaintiffs' claim from being asserted at this late date. At a minimum, equity counsels against requiring expedited relief when the need for expedited treatment is the result of Plaintiffs' delay in asserting their claims.

As for Plaintiffs' request for an expedited hearing on the request for a preliminary injunction, the Elector Defendants object to that request because none of the Texas Electors have yet been served with process. Since this Court issued the November 20, 2000 order setting forth a briefing schedule, Plaintiffs have filed their Amended Complaint, which adds 32 new named parties to this lawsuit.<sup>2</sup> With this amendment, there are now 32 unserved parties that have a right to be heard on Plaintiffs' requested relief. While the undersigned has been successful in contacting a few of the Texas Electors, many have not yet been contacted. Those that have been contacted were not aware

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<sup>2</sup>The 32 Texas Electors were previously named as "Doe" parties in Plaintiffs' original complaint.


that they had been sued by Plaintiffs. Expediting the briefing schedule under these circumstances is untenable. Accordingly, the Elector Defendants request that this Court first order Plaintiffs to serve each defendant to this action with process. Once that is accomplished, the Elector Defendants have no objection to the briefing schedule set forth in this Court's November 20, 2000, order. The date of submission of the preliminary injunction motion will largely be in the control of Plaintiffs since the briefing schedule will be triggered when the Plaintiffs serve all of the defendants and file their injunction papers.

The Elector Defendants also object to consolidation of the preliminary injunction hearing with a trial on the merits. A trial on the merits results in a final judgment, as opposed to the temporary relief afforded by a preliminary injunction. In the event that the motion to dismiss is denied, the defendants are entitled to adequate time to prepare for a trial on the merits. In addition, consolidation is unnecessary since Plaintiffs have the ability to obtain interim relief if they are successful in their motion for preliminary injunction. Moreover, consolidation would also be unfair given that none of the Texas Electors have been served with process. Even assuming those parties are served prior to any such trial, their answer dates will almost certainly be after the date of any such trial if it is consolidated with the preliminary injunction hearing. Consolidation is certainly unjustified when it will force a party to a trial on the merits before its answer date.

WHEREFORE, PREMISES CONSIDERED, the Elector Defendants respectfully request that this Court dismiss Plaintiffs' Amended Complaint and deny Plaintiffs' request for expedited discovery and an expedited hearing consolidated with a trial on the merits as moot. In the alternative, the Texas Electors respectfully request that this Court deny the Plaintiffs' request for expedited discovery, require Plaintiffs to serve all defendants in this action, establish a briefing

schedule for the preliminary injunction hearing in accordance with this Court's order of November 20, 2000 to take effect once all defendants have been served, and deny Plaintiffs' request for a consolidation of the preliminary injunction hearing with the trial on the merits. The Elector Defendants also respectfully request that this Court grant them all other relief to which they are justly entitled.

Respectfully submitted,  
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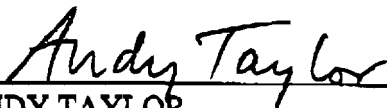
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COWART, MICHAEL DUGAS, AND JOHN  
ABNEY CULBERSON

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via certified mail, return receipt requested and facsimile this 27<sup>th</sup> day of November, 2000, to:

William K. Berenson  
Law Offices of William K. Berenson, P.C.  
1701 River Run, Suite 900  
Fort Worth, Texas 76107  
817/885-8000  
817/335-4624 (facsimile)

A handwritten signature in cursive script that reads "Andy Taylor". The signature is written in dark ink and is positioned above a horizontal line.

ANDY TAYLOR

First Assistant Attorney General